In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1350

EDWARD E. MATOSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11–15) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1970, and a petition for rehearing was denied on February 26, 1970 (Pet. 11, 16). The petition for a writ of certiorari was filed on March 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an intention to defraud the government of taxes owed is an essential element of the misdemeanor of willful failure to file an income tax return.

STATUTES INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

> Sec. 7201. Attempt to evade or defeat tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
>
> Sec. 7203. Willful failure to file return, supply information, or pay tax.
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT

Petitioner, after a jury trial, was convicted and sentenced on all counts of a three-count indictment charging that he willfully failed to file timely federal income tax returns for the years 1962, 1963, and 1964,

in violation of Section 7203 of the Internal Revenue Code of 1954 (Pet. App. 11). The trial court instructed the jury that "willfully" as used in Section 7203 "means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent, or negligent conduct, and that the only bad purpose or bad motive necessary for the government to prove is a deliberate intention not to file returns which the defendant knew ought to have been filed" (Pet. App. 12). The court of appeals affirmed, holding that the above-described instructions were correct and that the trial court did not err in rejecting petitioner's proffered instructions, which asserted the existence of a tax-associated motive as an essential element of willfulness; petitioner would have required a failure to file "so that the government would not know the extent of liability" and a "purpose to prevent the government from getting that which it lawfully requires" (Pet. App. 12).

It was stipulated that petitioner was required to file income tax returns for the years involved, that he knew that he was so required, and that he filed no returns for 1962 and 1963 and did not file a return for 1964 until April 17, 1967. There was evidence that petitioner had fled from New York to Chicago to avoid a state prosecution and that his purpose in failing to file returns was to avoid detection of his whereabouts and apprehension. (Pet. App. 11.)

ARGUMENT

The decision below is correct and there is no conflict of authority.

1. Petitioner's contention (Pet. 7–9) is, in substance, that there is no violation of the failure-to-file misdemeanor statute (Section 7203 of the 1954 Code) unless the taxpayer's purpose was to evade or defeat a tax or the payment thereof—the same purpose proscribed by the tax-evasion felony statute (Section 7201 of the 1954 Code).

In *Spies* v. *United States*, 317 U.S. 492, this Court considered the relationship between the predecessor provisions under the 1939 Code of the present Sections 7201 and 7203 (which were carried forward in the 1954 Code without any change material here). The Court held in *Spies* that the felony of willfully attempting to evade or defeat a tax or the payment thereof involves something more than the misdemeanor of willfully failing to file a return or pay a tax; an affirmative act is necessary for the felony in view of the use of the word "attempts" in the felony statute and in view of the greater gravity of a felony in contrast to a misdemeanor. The Court's opinion discussed the inter-related hierarchy of civil and criminal penalties for enforcing the revenue laws and, concerning the misdemeanor statute here involved, stated (317 U.S. at 496):

> But a duty may exist even when there is no tax liability to serve as a base for application of a percentage delinquency penalty; the default may relate to matters not identifiable with tax for a particular period; and the offense may be more grievous than a case for civil penalty. Hence the willful failure to make a return, keep records, or supply information when required, is made a misdemeanor, without regard

> to existence of a tax liability. * * * Punctuality is important to the fiscal system, and these are sanctions to assure punctual as well as faithful performance of these duties. [1]

Since it is thus a misdemeanor intentionally to fail to file a tax return "without regard to existence of a tax liability," there is obviously no requirement of a purpose to evade a tax or defeat its payment in the commission of this offense. It also follows that the district court committed no error in denying petitioner's requested instructions (*supra*, p. 3).

In making a specified amount of *gross* income the touchstone of the requirement that a return be filed,[2] Congress obviously intended to supply the revenue authorities with timely information from which they can ascertain whether a tax liability exists. Contrary to petitioner's suggestion (Pet. 9), mere civil penalties would not suffice, because a person who owed no tax could then safely file no return even if he had the requisite gross income; there would be "no tax liability to serve as a base for application of a percentage delinquency penalty". *Spies* v. *United States*, *supra*, at 496.

2. This case involves no conflict of authority. Only this Term the Court denied a petition for certiorari presenting the same question presented here. See *Fahey* v. *United States*, 396 U.S. 957, rehearing denied, 396 U.S. 1063. Petitioner's reliance (Pet. 7) on

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[1] To the same effect, see *Sansone* v. *United States*, 380 U.S. 343, 354, where the Court stated that the willfulnes required by Section 7203 (at issue here) is not vitiated by an intent to report the income and pay the tax in the future.

[2] See Internal Revenue Code of 1954, Section 6012(a)(1).

Haner v. *United States*, 315 F. 2d 792 (C.A. 5), and *United States* v. *Vitiello*, 363 F. 2d 240 (C.A. 3), is misplaced. In each of those cases a conviction was reversed because the court of appeals believed the instructions would have permitted a conviction under Section 7203 merely on a finding of careless or negligent conduct. No such instructions were given here; the jury was told that "willfully" in Section 7203 "means simply voluntary, purposeful, deliberate and intentional conduct as distinguished from accidental, inadvertent, or negligent conduct" (Pet. 6).[3]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1970.

[3] In his "Statement of the Case" petitioner cites three decisions as having "approved" of the instructions which he requested here (Pet. 6). These were all affirmances of convictions for violations of Section 7203. To the extent that the instructions had included language similar to that proffered by the petitioner here, there is no indication in any of the opinions that there would have been a reversal if such instructions had been omitted.

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